

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of) File No. EB-05-IH-0067
) NAL Account No. 200732080013
CITICASTERS LICENSES, L.P.) Facility ID No. 29732
) FRN No. 0004311619
Licensee of Station WFLZ-FM, Tampa, Florida)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 30, 2007**Released: January 30, 2007**

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), we find that Citicasters Licenses, L.P. ("Citicasters"), licensee of Station WFLZ-FM, Tampa, Florida, apparently willfully violated Section 73.1206 of the Commission's rules¹ by broadcasting a live telephone conversation and recording it for later broadcast without giving proper notice to the individual being called of the licensee's intention to do so. Specifically, on or about November 17, 2004, Citicasters engaged in a telephone conversation with actress Nicollette Sheridan and placed her live on the air without informing her of its intention to broadcast the dialogue and record it for later use. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),² that Citicasters is apparently liable for forfeiture in the amount of \$10,000.

II. BACKGROUND

2. On December 7, 2004, the Commission received a complaint from a listener³ alleging that on or about November 18, 2004, MJ Kelli ("Kelli"), the host of Station WFLZ-FM's morning show, telephoned actress Nicollette Sheridan about the controversy then surrounding her appearance in a promotional spot preceding ABC Sports' telecast of its Monday Night Football game on November 15, 2004.⁴ According to the complainant, Kelli failed to notify Ms. Sheridan that the telephone conversation was being broadcast live over Station WFLZ-FM.⁵

¹ See 47 C.F.R. § 73.1206.

² See 47 U.S.C. § 503(b).

³ See Letter to William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission ("Complaint").

⁴ On November 15, 2004, as the introductory segment to the broadcast of the National Football League game between the Philadelphia Eagles and Dallas Cowboys, ABC aired a scene featuring Eagles wide receiver Terrell Owens and Ms. Sheridan, appearing as her character on the ABC program "Desperate Housewives." Following the broadcast, the Commission received complaints alleging that the "Monday Night Football" scene contained indecent material. The Commission found the broadcast not to be indecent. See *Complaints Against Various Television Station Licensees Regarding the ABC Television Network's November 15, 2004, Broadcast of "Monday Night Football,"* Memorandum Opinion and Order, 20 FCC Rcd 5481 (2005).

⁵ See Complaint at 1.

3. On February 7, 2005, the Enforcement Bureau directed a letter of inquiry to Citicasters regarding the alleged telephone broadcast.⁶ In response, Clear Channel Communications, Inc. ("Clear Channel"), the parent company of Citicasters, admits that, on or about November 17, 2004, at approximately 7:30 am, Kelli initiated a telephone conversation with Ms. Sheridan and placed her on the air live over Station WFLZ-FM.⁷ According to Clear Channel, Kelli also recorded the conversation and rebroadcast it over Station WFLZ-FM the following day. Clear Channel states that "[i]t does not appear that Mr. Kelli informed Ms. Sheridan of his intention to broadcast the conversation live, or to record it for later broadcast, prior to broadcast or recording of the conversation," although "Ms. Sheridan was advised that the call was from a radio show very early on, before any substantive discussion occurred."⁸ Moreover, Clear Channel states that the taped telephone conversation was also aired over Stations WFKS(FM), Neptune Beach, Florida, and KSLZ(FM), St. Louis, Missouri,⁹ both of which are licensed to companies of which Clear Channel is the ultimate parent.

III. DISCUSSION

4. Section 73.1206 of the Commission's rules requires that:

Before recording a telephone conversation for broadcast, or broadcasting such conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.¹⁰

Thus, under Section 73.1206, a licensee must generally notify a party to a telephone call of its intention to record the conversation for broadcast before it commences such recording. The rule reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.¹¹ The Commission has held that the prior notification requirement ensures the protection of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.¹²

5. In the instant case, Clear Channel concedes that Kelli initiated a telephone conversation with

⁶ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Citicasters Licenses, L.P., dated February 7, 2005.

⁷ See Letter from Andrew W. Levin, Executive Vice President and Chief Legal Officer, Clear Channel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated March 4, 2005 ("Response"), at 1.

⁸ *Id.* at 1-2.

⁹ See *id.* at 1.

¹⁰ See 47 C.F.R. § 73.1206.

¹¹ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); see also *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004) (forfeiture paid).

¹² *1988 Order*, 3 FCC Rcd at 5463, ¶ 19.

Ms. Sheridan on or about November 17, 2004, at approximately 7:30 am, and placed her live on the air over Station WFLZ-FM.¹³ Moreover, Clear Channel admits that Kelli recorded the conversation for later broadcast and, in fact, broadcast the taped conversation over Station WFLZ-FM the following day.¹⁴ Clear Channel states that the taped conversation was rebroadcast again over Stations WFKS(FM), Neptune, Florida, and KSLZ(FM), St. Louis, Missouri.¹⁵ According to Clear Channel, it does not appear that Kelli informed Ms. Sheridan of his intention to broadcast the conversation live or to record the conversation for future broadcast.

6. We reject Clear Channel's suggestion that Ms. Sheridan may be presumed to have known that her conversation would be broadcast live or recorded for future broadcast because Kelli informed her that he was associated with a radio show.¹⁶ Section 73.1206 articulates the limited circumstances under which no explicit notice is required. Under Section 73.1206, a party is presumed to be aware that a telephone conversation is or will be broadcast only when the party to the call is associated with the station or originates the call and it is obvious that the call is in connection with a program during which the station customarily broadcasts telephone conversations.¹⁷ Clear Channel does not claim that these factors existed here. Indeed, in the instant case, Ms. Sheridan was neither associated with Station WFLZ-FM, nor did she originate the telephone call in question.

7. We also find no merit to Clear Channel's claim that, because the complaint was filed by someone other than Ms. Sheridan, the Commission should refrain from taking action in this instance. We have previously considered third party complaints in other such Section 73.1206 cases,¹⁸ and find no reason to depart from that practice. Given the important privacy interests served by Section 73.1206, Clear Channel's conduct in this case is no less violative of Section 73.1206 simply because someone other than Ms. Sheridan brought the matter to our attention.

8. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹⁹ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission or [any] act, irrespective of any intent to violate" the law.²⁰ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,²¹ and the Commission has so interpreted the term in the Section 503(b) context.²² Based on the evidence before us, we find that Citicasters apparently willfully violated Section 73.1206 of the Commission's Rules by failing to notify a party to a telephone conversation of its intent to record and broadcast their conversation.

9. Pursuant to the *Forfeiture Policy Statement* and Section 1.80 of the Commission's Rules, the base forfeiture amount for violations of this type is \$4,000.²³ In addition, the Commission rules provide that

¹³ See Response at 1.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.* at 2.

¹⁷ See 47 C.F.R. § 73.1206.

¹⁸ See, e.g., *WXDJ Licensing, Inc.*, 19 FCC Rcd at 22447; *Tempe Radio, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 20102 (Enf. Bur. 2003) (forfeiture paid).

¹⁹ 47 U.S.C. § 503(b).

²⁰ 47 U.S.C. § 312(f)(1).

²¹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²² *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²³ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80 (2005).

base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act²⁴ and Section 1.80(a)(4) of the Commission's rules, which include "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁵

10. As we have stated elsewhere, we regard the repeated broadcast of an improperly recorded telephone conversation as an aggravating circumstance requiring an upward adjustment of the forfeiture amount.²⁶ The licensee here rebroadcast the conversation at least three times -- not only on the station that originally aired the material, but on two other stations as well. We also note Clear Channel has a history of violations relating to the rule, having received three other forfeitures for similar violations since 2000.²⁷ Finally, we also must consider Clear Channel's exceptional size and ability to pay a forfeiture.²⁸ Therefore, based upon the facts and circumstances presented here, we find that Citicasters is apparently liable in the amount of \$10,000 for violating the telephone broadcast rule.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's Rules, Citicasters Licenses, L.P. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars (\$10,000) for violations of Section 73.1206 of the Commission's Rules.²⁹

12. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Citicasters Licenses, L.P. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL Acct. No. and FRN No. referenced in the caption. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251.

²⁴ 47 U.S.C. § 503(b)(2)(D).

²⁵ 47 C.F.R. § 1.80(a)(4).

²⁶ See, e.g., *KOFI, Inc.*, Notice of Apparent Liability, 20 FCC Rcd 5995, 5997, ¶6 (Enf. Bur. 2005), *forfeiture reduced on other grounds*, 20 FCC Rcd 17886 (Enf. Bur. 2005) (forfeiture paid).

²⁷ See, e.g., *AMFM Radio Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 245418 (Enf. Bur. 2004) (forfeiture paid; finding AMFM Radio Licenses, LLC, a Clear Channel subsidiary, apparently liable for a violation of section 73.1206 of the Commission's rules); *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5893 (Enf. Bur. 2002) (forfeiture paid; finding Clear Channel Broadcasting Licenses, Inc. apparently liable for recording and later broadcasting a telephone call placed by a Clear Channel employee to a radio personality at another station without giving the notice required by Section 73.1206 of the Commission's rules); *Citicasters, Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 13805 (Enf. Bur. 2000) (forfeiture paid; finding Citicasters, a Clear Channel subsidiary, apparently liable for the broadcast of a conversation between the complainant and another person, which was taken from that complainant's answering machine).

²⁸ In 2005, Clear Channel Communications, Inc. had more than \$6.6 billion in annual revenue. See Clear Channel Communications, Inc., 2005 Annual Report on Form 10-K, Securities and Exchange Commission at 29 (filed March 10, 2006). The Commission directed, in the *Forfeiture Policy Statement*, that forfeitures should not be simply an affordable cost of doing business. *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01.

²⁹ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

14. IT IS FURTHER ORDERED, that the response, if any, shall be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the NAL/Acct. No. referenced above.

15. IT IS FURTHER ORDERED, that the Commission shall not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director -- Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³⁰

17. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Citicasters Licenses, L.P. at its address of record; and to John Fiorini, Esq. Wiley Rein & Fielding, LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

³⁰ See 47 C.F.R. § 1.1914.